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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-696 and 73-830

THE EMPORIUM CAPWELL COMPANY,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL URBAN LEAGUE AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CONSENT TO FILING

This *amicus curiae* brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF *AMICI CURIAE*

National Urban League. The National Urban League is a professional community service organization consisting of 102 affiliates around the country, five regional offices, and a Washington bureau. The League, which is nonpartisan and interracial in its leadership and staff, is committed to securing equal opportunities for blacks and other minorities in all areas of American life. The League has been particularly concerned with the eradication of discrimination in employment and believes that the outcome of this case is important to its efforts to aid minority employees in the eradication of on-the-job discrimination.

Southern Christian Leadership Conference. The Southern Christian Leadership Conference is an eleemosynary organization dedicated to improving the civic, religious, economic, and cultural conditions of black people throughout the United States. The SCLC has consistently attempted to improve the economic position of minorities by aiding in the eradication of employment discrimination and believes that this Court's decision in the present case will have a significant effect on the continuing ability of minority workers to protect their rights to nondiscrimination in employment.

QUESTION PRESENTED

Whether peaceful leafleting by two black employees, on their own time, protesting their employer's racially discriminatory policies, oses its status as a protected "concerted activity" under Section 7 of the National Labor Relations Act, so as to justify their discharge, because the object of the leafleting was for the two employees to discuss with the employer's president their allegations of

racial discrimination—allegations which were cognizable under Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

A. *Factual Background*

In view of the contentions of the petitioners and of the *amici* supporting them, we believe it important to set out the relevant factual background of the case in some detail. The Emporium Capwell Company (the "Emporium"), one of the petitioners herein, operates a department store in San Francisco. Despite the passage of Title VII of the Civil Rights Act of 1964, the Emporium's record as an equal opportunity employer has been entirely unimpressive.

According to 1970 census data, the population of the San Francisco metropolitan area is 28.9% minority, including 10.6% blacks, 0.4% American Indians, 5.3% Asian-Americans, and 11.7% Spanish-surnamed Americans.[1] By 1968, the Emporium had 6,179 employees of whom 835 (13.5%) were members of minority groups. The minority employees consisted of 283 blacks (4.6%), one American Indian (less than 0.1%), 195 persons of Asian descent (3.2%) and 352 Spanish-surnamed Americans (5.7%). Of the 1,231 managerial, professional, and technical employees of Emporium, a mere 72 (5.9%) were members of minority groups. Of the 2,898 sales personnel, only 286 (9.9%) were members of minority groups. (A. 120)[2] Furthermore, it appears that the minority sales personnel were as a matter

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[1] Department of Commerce, Bureau of the Census, 1970 Census of Population, Characteristics of the Population, California 6-102 (1973); Office of Research, EEOC, Employment Profiles of Minorities and Women in the SMSAs of 17 Large Cities, 1971, pp. 89, 92 (June 1973).

[2] "A" refers to the Appendix filed in this Court.

of course assigned to the less desirable departments. Thus, the record shows that there were no minority sales personnel in the rug department, the high fidelity department, the television department, the kitchen appliance department, the furniture department, the fur department, the better women's coats department, the maternity clothes department, the wedding gown and formal clothing department, and the women's suit department—all of which paid relatively high commissions. (A. 116-17)

On December 29, 1967, Department Store Employees' Union Local 1100 signed a union shop collective bargaining agreement with the San Francisco Retailers' Council, a multiemployer bargaining unit of which the Emporium is a member.[3] (A. 99) Section 21E of that collective bargaining agreement provides that

> "No person shall be discriminated against in regard to hire, tenure of employment, job status by reason of race, color, creed, national origin, age or sex." (A. 101)

Sections 36B-F of the agreement provide an elaborate means of resolving "all complaints and disputes arising" from the agreement. These sections provide for an Adjustment Board consisting of three union and three management representatives and further provide that where the Adjustment Board is unable to resolve a dispute in seven days, either party may request the matter to be submitted to an impartial arbitrator whose decision "shall be accepted as final and binding." (A. 101-03)

Despite the nondiscriminatory generalities of the collective bargaining agreement, the pattern of racial discrimina-

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[3] The agreement, which is reproduced in relevant part at A. 99-103, appears to be dated December 29, 1967, but provides that it "shall be effective from June 1, 1967." (A. 99, 103)

tion on the part of the Emporium described above persisted. In the spring of 1968, a number of minority employees at the Emporium, including Hawkins and Hollins —whose firing precipitated the present litigation—began to accumulate specific evidence of the Emporium's racially discriminatory personnel practices.

In a series of meetings in the spring of 1968, the employees turned over much of the evidence they had collected to the union and requested that the union take action to eliminate discriminatory practices. (P.A. 33-34)[4] The first such meeting took place on April 3, 1968. Mr. Walter Johnson, the chief executive officer of the local union, testified that

> "it was the general consensus of the opinion . . . of those present that there were less opportunities for those who were in the minority race, not only Negroes, but we had Filipinos and all different groups represented.
>
> "Among the grievances mentioned were the facts that they had probably not proper treatment from the supervisors and also not the opportunity for promotion." (A. 73)

Mr. Johnson's report on the meeting contains the following language about the race discrimination problems:

> "Probably the most important matter raised was a possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

[4] "P.A." refers to the Appendix to the Certiorari Petition filed by the Emporium.

> "It was further mentioned by the Stewards and the Committee that most of the minority people were disgusted and were looking for other jobs. They feel that they are entitled to more than a job; that they should have the same opportunity to advance as other employees do." (A. 111-12)

After the April meeting, Mr. Johnson met with the Retailers Council and with the Emporium. In addition to the general allegations of racial discrimination, matters discussed covered specific instances of discrimination involving the failure to promote blacks to supervisory positions. The Emporium's labor relations manager agreed that "the store would look into it and then see what they could do to alleviate the circumstances." (A. 74, P.A. 4, 82)

In May 1968 a group of ten employees, expressing their continued concern about the racial situation, met with Johnson. According to Johnson, "there was some delay in there and finally in September" still a third meeting was held between union officials and minority employees to discuss the problem of the racially discriminatory policies of the Emporium. (A. 74)

At the September 3 meeting, Johnson announced that the union had considered the problem and concluded that the Emporium had been acting discriminatorily. (A. 74-75) Johnson stated that the union would demand an Adjustment Board meeting and would insist upon arbitration if necessary. Johnson acknowledged that arbitration "is going to take a long time" but stated that such arbitration would "have some lasting effect." (A. 75-76) As of this time, it was the union's "official position" that there was unlawful racial discrimination at the Emporium. (A. 78)

On September 4, 1968, the day after the meeting, Johnson wrote to the Retailers Council to request a meeting of the

Adjustment Board and arbitration to resolve "specific" charges of racial discrimination. (A. 80, 119) As a result, on October 16, 1968, more than six months after the charges of racial discrimination were first brought to the union's attention, a meeting of the Adjustment Board was held to consider a number of allegations of discrimination by the Emporium against specific individuals. (A. 75)

The minority employees involved believed that such a procedure would result only in a few token promotions and would leave untouched the basic problem—the Emporium's policy of discriminating against minorities as a class in hiring and promotion. In their view, a real solution to the problems of discrimination could only come about if the Emporium reexamined its overall personnel policies with respect to minorities as a class.[5] As a result, at the meeting, Hollins, speaking for himself and three other black employees

> "made a statement that we were not going to speak at this meeting as individuals, we were speaking as a group and our main purpose was to talk to the President [of the Emporium] to try to reach an agreement with him to straighten out the problem and conditions of The Emporium." (A. 35)

The four employees thereupon left the meeting and refused to participate in the union's processing of their grievances. A second meeting of the Adjustment Board was held two days later. The record does not indicate what trans-

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[5] Hawkins' and Hollins' insistence in this regard was hardly unreasonable. Courts have uniformly held that racial discrimination necessarily affects minorities as a class and that, accordingly, class-wide remedies are required to eliminate such discrimination. *See, e.g., Georgia Power Co.* v. *EEOC*, 412 F.2d 462, 468 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969).

pired at that meeting, but none of the four employees attended.

At approximately this time, Hollins went to see the president of the Emporium and asked to talk to him "about a situation that [he] felt should be discussed about things that were happening among minority employees at the store." (A. 65) The company president refused to speak with Hollins, but suggested that he discuss his problems with the personnel manager. Hollins declined to do so, having previously spoken to the personnel manager to no avail. (A. 65, P.A. 8)

On October 22, 1968, Hollins and Hawkins, together with several other employees, held a press conference. Hollins explained that the group was

> "planning on leafleting and boycotting the store because we felt that employees were not being treated fairly, minority employees were not being treated fairly as far as working conditions was [*sic*] concerned." (A. 48)

On Saturday, November 2, on their own time, Hollins and Hawkins and two other employees distributed a handbill to people entering and leaving the store. While their conduct has subsequently been described as "picketing" (see, *e.g.*, NLRB Br. 38), the record indicates that they did not carry signs or engage in any effort to induce employees not to enter the premises. Rather, their activities were at customer entrances and consisted of passing out copies of a handbill which urged minority group members not to shop at the Emporium. (A. 46-47)

The language of the handbill is not entirely temperate. However, even if they could be judicially cognizable, issues as to its literary quality or temperateness are not before this Court, since the administrative decision in this case, as

will be developed below, was based entirely on the *objective* of Hollins and Hawkins in passing out the handbills. The handbill stated that the Emporium had been discriminating against minorities for years by relegating them to the lowest paid jobs and refusing to promote them. The handbill called upon all minorities "to take their money out of this racist store" until minorities were given full equal employment opportunities. A copy of the handbill appears at A. 105 and P.A. 9. The record is clear, and the handbill itself indicates, that at no time did the employees disparage the quality of the Emporium's merchandise or make any contentions with respect to the Emporium's policies except as to racial discrimination in hiring and promotion. There is no suggestion in the record of any physical obstruction of the premises by the leafleters.

On November 7, Hawkins and Hollins were called to the office of the personnel manager and given a written "warning" to refrain from leafleting or making any other public statements as to racial discrimination by the Emporium. (A. 49-50) A copy of the warning appears in the note below.[6] Notwithstanding the warning, Hollins and Hawkins, again on their own time, passed out similar leaflets protesting the Emporium's racial policies on the next Saturday, November 9, 1968. (A. 50, 107) The following Monday, both were fired. Their discharge slips stated:

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[6] "On November 2, 1968, you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

"These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

"There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

"This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement." (A. 106)

"You are being discharged today. Distribution of 'Boycott Emporium' literature on November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68." (P.A. 10, 40)

B. *The Proceedings Below*

As a result of the firing, a charge was filed with the National Labor Relations Board ("Board") alleging that the Emporium violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by terminating Hollins and Hawkins for engaging in protected concerted activity within the meaning of Section 7 of the NLRA.[7] The Trial Examiner found that Hollins and Hawkins had indeed engaged in concerted activity within the meaning of Section 7 of the NLRA[8] and that this activity had been based upon a good faith belief that the Emporium was discriminating against racial minorities. (P.A. 94-97) However, the Examiner focused on the objective of the leafleting and, although the record was somewhat conflicting, found that the objective of Hawkins and Hollins was to attempt to bargain with the Emporium as to its minority hiring and promotion practices. (A. 103-04) That attempt, the Examiner concluded, was "inconsistent with and disruptive of" the procedures for settling grievances under the collective bargaining agreement. Thus the Examiner held that the leaf-

[7] In addition, the union filed a grievance charging that the firings were in violation of the collective bargaining agreement. (P.A. 40)

[8] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in . . . [Section 8(a)(3)]." 29 U.S.C. § 157.

leting lost its Section 7 protection because of its objectives:

> "[T]o extend the protection of the [National Labor Relations] Act to the two employees named in the Complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement." (P.A. 104-05)

In reaching this result, the Examiner refused to consider Title VII of the Civil Rights Act of 1964 and its effect on union-minority relations, or even the NLRA's own antidiscrimination policies, because he "noted" that the Board does "not belong in the contemporary civil rights struggle." (P.A. 101) The Board, in a three-to-two vote, summarily affirmed the Trial Examiner's finding without opinion. (P.A. 56)

The court below unanimously reversed the Board's decision on the ground that both the Trial Examiner and the Board majority completely ignored the policies of the Civil Rights Act. The two-member majority of the court noted that concerted activity protesting racial discrimination has a unique protected status under Section 704(a) of Title VII of the Civil Rights Act of 1964.[9] For that

[9] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a).

reason, the court held that such concerted activity—even if it did amount to attempting to "bargain" with the employer—should not lightly be held to lose the protection of Section 7 of the NLRA. (P.A. 19-22)

The court, tracing through the background of the case, found that the two minority employees involved attempted for a reasonable period of time to work through the union grievance procedure and found, in addition, that the minority employees and the union local were not working at cross purposes. (P.A. 24-26) Furthermore, the court found that the minorities' conduct could not significantly interfere with the union's position as a collective-bargaining representative because the union was required by Title VII, as well as by its collective-bargaining agreement, to eradicate employment discrimination. (P.A. 23) The court held that under these circumstances, the interaction of the NLRA and Title VII required the protection of concerted minority action protesting racial discrimination independent of the union unless the union was actually remedying the situation "to the *fullest extent possible by the most expedient and efficacious means.*" (P.A. 28) (emphasis original) Since no evidence had been adduced in that respect, the court remanded the case to the Board for further proceedings.

The third member of the court, while agreeing that reversal of the Board's decision was required, believed that Title VII of the Civil Rights Act of 1964 provides employees an absolute right to be free of racial discrimination in employment. Furthermore, this right belongs to the minority group members involved, not to the union. Thus, no union may bargain away this right, whatever the union's good faith, and whatever the desires of the majority of the union's members. (P.A. 45-46) As a result, that judge con-

cluded that minority employees are entitled to treat on their own with the employer as to issues of racial discrimination and that their concerted activity herein was therefore protected under Section 7 of the NLRA. Indeed, in his view, any contrary holding which put the processes of the Board behind a majority-white union's handling of black employees' rights to nondiscrimination against the black employees' expressed desires and forbade the black employees to speak for themselves on racial issues would render the NLRA unconstitutional as so appl'ed. (P.A. 42, 51) Accordingly, the third judge would have required the reinstatement of the two employees without a remand.

SUMMARY OF ARGUMENT

I. It is undisputed that Hawkins' and Hollins' actions at issue constituted concerted activity of the sort which is normally protected by Section 7 of the NLRA. Indeed, the the Trial Examiner and the Board majority, in adopting the Examiner's opinion, so held. (P.A. 94) However, the petitioners claim that, by attempting to negotiate with their employer as to issues of racial discrimination,[10] Hawkins and Hollins interfered with the union's exclusive right under Section 9(a) of the NLRA to enter into and enforce a collective-bargaining agreement and thereby forfeited their Section 7 protection.

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[10] We assume, along with the Court of Appeals, that Hawkins and Hollins were discharged for attempting to bargain with the Emporium over issues of racial discrimination. However, as the statement of the case above indicates, and as the *amicus* brief of Department Store Employees Union, Local 1100, argues, a persuasive case can be made that Hawkins and Hollins were discharged solely because they made public statements and distributed leaflets contending that the Emporium was discriminating. Such activity is plainly protected. *NLRB* v. *Magnavox Co.*, —— U.S. ——, 94 S. Ct. 1099 (1974); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938). See the discussion, page 34, *infra*.

The petitioners' argument collapses because it ignores the interrelationship of Title VII of the Civil Rights Act of 1964 and the NLRA. Title VII gives minority employees an individual and absolute statutory right to sue—and, necessarily, to attempt to negotiate a settlement with—their employer on racial discrimination issues without dealing through the union. The employee's right to seek a settlement obviously includes the right to seek to meet with his employer. And, in view of Title VII's strong policy in favor of voluntary resolution of disputes, that right extends to attempts to resolve racial discrimination complaints prior to the institution of formal Title VII proceedings. Hawkins' and Hollins' attempt to meet with their employer was thus specifically authorized by Title VII. The exercise of Title VII rights is protected by Section 7 of the NLRA.

II. With the case seen in this perspective, the various arguments tendered by petitioners and the *amici curiae* supporting them fall of their own weight. To be sure, if the Emporium were to bargain with Hawkins and Hollins, this could theoretically derogate from the principle of exclusivity and in theory be disruptive of the processes of bargaining exclusively between the union and the management—although as a practical matter those fears are scarcely warranted on the present record. But where Title VII rights are involved, the union's "exclusivity" is limited in any case. Individual employees are empowered under Title VII to sue, and to negotiate a settlement of such a suit. The result of such a suit or settlement is likely to be much more disruptive of management's "one-on-one" bargaining with the union or of the principle of exclusivity than whatever proposal Hawkins and Hollins would have made to the Emporium's president had they ever been allowed to talk to him. The fact of the matter is that by

providing private rights to individual employees under Title VII of the Civil Rights Act outside the formal sphere of exclusive bargaining between union and management, Congress has made nonexclusive the union's role in the field of racial discrimination. In so doing, Congress has made a choice to subordinate the values inherent in the exclusivity principle to strong enforcement of the policy against racial discrimination which it thought more important.

ARGUMENT

I. Concerted Activity by Minority Employees to Redress Alleged Racial Discrimination Is Both Authorized by Title VII of the Civil Rights Act and Protected under the National Labor Relations Act

The precise issue of this case is whether under the NLRA, read in conjunction with Title VII of the Civil Rights Act of 1964, the Emporium was justified in firing Hawkins and Hollins because they handed out leaflets publicizing a grievance they had with their employer. The leafleting was performed entirely on their own time and on public property, and did not involve any obstruction of access to the employer's premises. Although Hawkins' and Hollins' leafleting is a classically protected form of concerted activity, their conduct was held unprotected by the Trial Examiner and the Board because of its objective. That objective was, the Trial Examiner and the Board held, Hawkins' and Hollins' efforts to meet with the management of the Emporium in an effort to resolve their charges of racial discrimination.

But, as the discussion below demonstrates, Hawkins' and Hollins' objective was not only lawful—it was specifically authorized by Title VII. The exercise of Title VII

rights is protected activity within the coverage of Section 7 of the NLRA. Accordingly, the firing of Hawkins and Hollins is prohibited under the NLRA.

A. *Hawkins and Hollins Were Entitled to Proceed under the Collective Bargaining Agreement, or under Title VII, or Both, Without Regard to the Union's Views*

This Court's recent decision in *Alexander* v. *Gardner-Denver Co.*, 94 S. Ct. 1011 (1974), makes it clear that where, as in the present case, there are "parallel" or "overlapping" rights against racial discrimination—one right contained in the union collective-bargaining agreement, and the other in Title VII—minority employees are entitled to exercise either or both of those rights at their option.

In *Alexander*, the black plaintiff was discharged for reasons he believed to be racially related. Alexander and his fellow employees were represented by a local union and the operative collective-bargaining agreement contained an antidiscrimination provision and a broad arbitration clause requiring the submission of all disputes to a grievance procedure culminating in arbitration. The collective-bargaining agreement provided that the decision of the arbitrator would be final and binding. 94 S. Ct., at 1015-16. The collective-bargaining agreement before the court in *Alexander* was thus virtually identical to that in force between the Emporium and the union in the present case.

Alexander filed a grievance which was processed through arbitration; the arbitrator found for the company. In the meantime, Alexander had filed a Title VII lawsuit. The lower courts dismissed Alexander's Title VII suit on the ground that Alexander was bound by the arbitrator's decision under the collective-bargaining agreement. This Court unanimously reversed:

"[L]egislative enactments in . . . [the area of equal employment opportunity] have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. . . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. . . .

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both [the Title VII and collective-bargaining agreement nondiscrimination] rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude . . . [enforcement of the statutory rights]." 94 S. Ct., at 1019-20.

Moreover, the Court held in *Alexander* that an employee's right to proceed under Title VII is "absolute." That is, an employee is free to pursue his or her Title VII rights without consultation with the bargaining representative,

or even against the direct desires of the bargaining representative:

> "Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights are not susceptible to prospective waiver [by the union]." 94 S. Ct., at 1021.

The reasoning of *Alexander* in this regard is particularly persuasive when it is recalled that Title VII was enacted in order to end the control of minority rights by union majorities:

> "A further concern [which prevents a holding requiring adherence to union procedures] is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers." 94 S. Ct., at 1024-25, n. 19.

Thus, Hawkins and Hollins were free to ignore their rights under the collective-bargaining agreement and exercise their rights under Title VII or vice versa. They were also free to proceed under both Title VII and the collective-

bargaining agreement either in sequence or simultaneously. And the decision in this regard was theirs alone.

B. *Hawkins and Hollins Were Fired for Exercising Their Title VII Rights in Seeking to Meet with Their Employer*

Alexander holds, and petitioners concede, that Hawkins and Hollins—or any other minority group member—had the right to file Title VII charges with the Equal Employment Opportunity Commission ("EEOC") and then file a lawsuit,[11] whatever the union's views and notwithstanding the union's position as bargaining agent. NLRB Br. 27-28. *See* 42 U.S.C. § 2000e-5(a) *et seq.* Where minority employees or potential employees prevail in a Title VII lawsuit, they are entitled to whatever relief is necessary to end the discrimination and eradicate its consequences. That relief often affects labor-management relations in a broad fashion. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (elimination of testing procedures); *Long* v. *Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971) (restructuring of seniority system); *Sims* v. *Sheet Metal Workers Int'l Ass'n, Local 65*, 489 F.2d 1023 (6th Cir. 1973) (establishment of affirmative action program); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972) (imposition of a temporary quota hiring system). The availability of such relief, of course, is in no way dependent upon the views of

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[11] Title VII provides for the following procedures: Where an individual believes that he or she has been the subject of unlawful discrimination, a charge may be filed with the EEOC. The EEOC investigates and, if it finds reasonable cause to believe the charge is true, attempts to conciliate the charge by reaching an accommodation satisfactory to both the employer and the employee. When the EEOC is not able to successfully conciliate the charge within 180 days of its filing, it may issue a "right to sue" letter. At this juncture, or at such time as the EEOC dismisses a charge, the charging party is entitled to file suit in a federal district court. Since the rights involved belong to the individual charging party, the charging party has control over any litigation he or she may bring as well as a right to intervene in any litigation brought on his or her behalf by the EEOC. 42 U.S.C. § 2000e-5(a) *et seq.*

the union or the provisions of the collective bargaining agreement—no matter what effect it might have on that agreement.

Hawkins' and Hollins' right to file a Title VII charge or suit on their own necessarily carries with it the right to settle on their own as well. *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973). Indeed, it is normal procedure in our judicial system for parties to attempt to resolve their differences either during or prior to litigation. Title VII is particularly clear in this regard, since "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [equal employment opportunity under Title VII]." *Alexander* v. *Gardner-Denver Co., supra,* 94 S. Ct., at 1017. *See also Culpepper* v. *Reynolds Metals Co.,* 421 F.2d 888, 891 (5th Cir. 1970) ("there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation"); *Oatis* v. *Crown Zellerbach Corp.,* 398 F.2d 496, 498 (5th Cir. 1968).

The right to settle their Title VII claims plainly protects Hawkins' and Hollins' right to request their employer to meet with them and to negotiate with them if so inclined. Settlements can hardly occur without discussions between the parties. In fact, Title VII complaints are often, perhaps mostly, settled by negotiations between the employer and the complaining employees. Where negotiations are successful, they can provide Title VII remedies and vindicate Title VII rights just as completely as a successful lawsuit. Such negotiations can take place between the parties concerned prior to the employees' institution of formal proceedings; through conciliation sponsored by the EEOC after charges have been filed but before the initiation of a lawsuit; or between the employer and employees or their

representatives after a Title VII lawsuit has been filed. All such negotiations are protected by Title VII.[12]

Thus, Title VII provides minority employees with the individual and absolute right, without the concurrence of their bargaining agent, to file charges and lawsuits to eliminate racial discrimination, and to seek to meet with their employer or his representatives to settle such disputes either after or prior to their commencement of formal proceedings. That, of course, is precisely what Hawkins and Hollins did, and, according to the Board, precisely why they were fired.

C. *Hawkins' and Hollins' Concerted Activity in the Exercise of Their Title VII Rights Is Protected by the National Labor Relations Act*

As we have seen, Hawkins' and Hollins' activity in seeking to meet with their employer to eradicate racially discriminating practices was an exercise of rights specifically guaranteed by Title VII of the Civil Rights Act of 1964. Discharge of employees for exercising their Title VII rights is unlawful under Section 704(a) of Title VII.[13] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

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[12] There is no distinction in this regard between a minority employee's right to settle his Title VII claims before or after he institutes a formal proceeding or lawsuit. Requiring minorities to initiate formal proceedings before settling would cause the filing of needless charges and lawsuits; add to the workload of the already overburdened EEOC and federal courts; replace informal and inexpensive contacts between employer and employee with the more formal and more expensive contacts arising once lawyers are hired and litigation is started; and create new procedural obstacles and time delays for victims of racial discrimination in employment. Such a result is plainly contrary to the policy of Title VII. *Alexander* v. *Gardner-Denver Co.*, *supra*.

[13] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a).

The Trial Examiner and the Board refused to consider the effect of Title VII in determining whether the NLRA protected the concerted activity of Hawkins and Hollins. Indeed, washing his and the Board's hands of consideration of such issues, the Trial Examiner specifically stated:

> "(Parenthetically, it is noted that as adjudicator under the [National Labor Relations] Act we do not belong in the contemporary civil rights struggle. Congress did not put us there.)" (parentheses original) (P.A. 101)

The Board committed plain error in failing to consider Title VII. As this Court held not long after the NLRA's passage, in *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942):

> "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task." 316 U.S., at 47.

In *Southern Steamship*, the Board attempted to extend the NLRA's protection to concerted activity specifically prohibited by another statute. *Cf. MacDonnell Douglas Corp.* v. *Green, supra.* Here the Board would interpret Section 9(a) of the NLRA to render unprotected conduct specifically protected by Title VII. But the lesson of *Southern Steamship* is the same in both instances.

Accommodating the policies of Title VII and of the National Labor Relations Act with respect to the protection of minority rights is hardly a difficult task, for both stat-

utes give special protection to minorities. Thus, the NLRA imposes a duty of fair representation upon collective bargaining representatives. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Furthermore, the Act makes it an unfair labor practice for an employer to engage in racial discrimination. *United Packinghouse Workers Int'l Union* v. *NLRB*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969). Moreover, even apart from Title VII, when an employee has a reasonable belief that the union is not processing or will not process his racial discrimination grievances properly, he or she may ignore the collective bargaining agreement's procedures and proceed directly against the employer on contractual grounds. *See Glover* v. *St. Louis-S.F.R. Co.*, 393 U.S. 324 (1969).

In the present case, the precise issue is whether Section 7 of the NLRA protects attempts by minority employees to meet with their employer to discuss matters cognizable in a proceeding under Title VII of the Civil Rights Act. We submit that a proper accommodation of Title VII and the NLRA requires that Sections 7 and 9(a) of the NLRA be interpreted to protect such activity. Any other interpretation of the NLRA attributes to Congress the irrationality of establishing a system of protection for minorities under which the NLRA would permit an employer to fire an employee for exercising his Title VII rights. Of course, the employee could later recover damages in a Title VII suit. But the immediate disadvantage of loss of employment would seriously diminish the value of Title VII rights and discourage attempts by employees to settle Title VII claims without litigation.

Such a result runs directly contrary to both statutes' policies of promoting voluntary resolution of disputes and of providing strong protection for the interest of racial minorities. As was pointed out in the legislative history

of the Civil Rights Act, there may well be employee activities which are protected under both Title VII and the NLRA.[14] The latter contains a general protection in Section 7 for concerted activities, which has historically been applied to peaceful leafleting on employees' own time such as was involved here. Since the objectives of the leafleting were to accomplish goals which could be accomplished under the Civil Rights Act, and which may be pursued by employees regardless of their representation by a union, those objectives cannot be said to violate the NLRA.

* * *

For the foregoing reasons, Hawkins' and Hollins' actions in the exercise of their Title VII rights to seek to resolve racial discrimination complaints are protected concerted activity within Section 7 of the NLRA. Accordingly, their discharge constituted an unfair labor practice under Section 8(a)(1) of the NLRA and they must be reinstated.

II. The Arguments Raised by Petitioners and the *Amici* Supporting Them Are Wholly Without Merit

Petitioners and the *amici curiae* who support them—the combination of the U.S. Chamber of Commerce and the AFL-CIO—raise various arguments in asserting that the objectives of Hawkins' and Hollins' leafleting forfeited the protection of Section 7 of the NLRA. Those arguments simply do not consider the Civil Rights Act of 1964. They

[14] "If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." (Justice Department Memorandum inserted in record by Sen. Clark.) Legislative History of Titles VII and XI of Civil Rights Act of 1964 (EEOC ed.) p. 3244. See also Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1400 (1972) (Remarks of Sen. Javits).

ignore the fact that the remedies under Title VII may be pursued by individual employees without reference to their collective bargaining agreements and that such rights are individual, plenary and statutory. The pursuit of such rights, whether by litigation or attempted negotiation, can hardly be said to be an unlawful objective. We will deal *seriatim* with these arguments:

1. *"Derogation from Exclusivity."* It is first contended that the protection of Title VII rights under Section 7 of the National Labor Relations Act will derogate from the certified union's role as exclusive spokesman for all employees under Section 9(a) of the Act. NLRB Br. 17-26; AFL-CIO Br. 4-8. This argument fails to take account of the distinction between the union's role with respect to most terms and conditions of employment and its role with respect to those terms and conditions protected by Title VII.

The scope of a union's exclusivity under Section 9(a) of the NLRA is narrowed in instances where there are specific statutory rights reserved to individual employees. *NLRB* v. *Magnavox Co.*, 94 S. Ct. 1099 (1974) (employees entitled to exercise statutory right to distribute literature notwithstanding prohibition of such distribution by collective bargaining agreement); *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971) (employee entitled to exercise statutory right to sue in wage dispute despite mandatory arbitration proceeding requirement in collective bargaining agreement). Thus, the broad requirements of Section 9(a) cannot preclude the exercise of specific individual statutory rights, and must yield to them. *See Laborer's Int'l Union, Local 478* v. *NLRB*, BNA DLR No. 140, p. A-6 (D.C. Cir., No. 73-1819, July 10, 1974).

Alexander v. *Gardner-Denver Co.*, *supra*, held that under Title VII the right to racial nondiscrimination in employ-

ment is a right vested in the individual employees and not subject to the NLRA's usual requirement of majority control through the bargaining agent. As a result, a union's decisions on a racial discrimination issue cannot bind minority employees. Rather, Title VII specifically authorizes minority employees to undertake the vindication of their rights themselves. 94 S. Ct., at 1021.[15] Thus, with respect to conditions of employment involving race, the union is simply not the sole spokesman for minority employees and that result is perfectly consistent with the well-established interpretation of Section 9(a).

2. "*Minority Negotiations Might Be Divisive.*" It is next claimed that as a practical matter allowing minority employees to discuss racial discrimination claims with the employer might well have a divisive effect on the bargaining unit. NLRB Br. 20-26. This danger exists, according to the Board, because the union "may disagree" as to the existence of racial discrimination. NLRB Br. 21. Furthermore, even if the union agreed that racial discrimination existed, solutions negotiated between the employer and the minority employees "would be likely to differ . . . from the particular solutions which the majority representative would advocate." NLRB Br. 23. This would prevent "the bargaining unit from maintaining a united front in its negotiation with management . . . ." NLRB Br. 21.

All of these arguments are plainly irrelevant. The union may well disagree with minority workers as to the existence of discrimination, or as to the proper solutions

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[15] Compare *Air Line Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc., supra*:

> "Title VII . . . does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged." 490 F.2d, at 641.

therefor.[16] Indeed, the union may be discriminating itself. That is why minorities are entitled to exercise their rights under Title VII whatever the union's view and even against the express desires of the union.[17] These rights clearly include the bringing of charges before the EEOC or the filing of a suit by the employees under Title VII of the Civil Rights Act—steps which are at least as "divisive" as the attempted minority contacts with the employer involved here. The court decree ending, or the settlement of, such an action might well order the employer to put into effect programs at cross purposes with "the particular solutions which the majority representative [the union] would advocate." But Congress was willing to tolerate such consequences in the vindication of Title VII rights, and there is no reason to believe that Congress' views on this

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[16] A union represents the desires of the majority of its members. Thus the interests of a majority white union and its minority members are often essentially conflicting on racial issues. *See Alexander* v. *Gardner-Denver Co., supra*, 94 S. Ct., at 1024-25, n. 19. This is obviously so since in case after case, Title VII remedies have required changes in testing procedures, seniority systems, referral practices, and other union-supported devices which have in the past advantaged white workers and disadvantaged minority workers, or the imposition of affirmative action plans to undo the effects of past discrimination participated in or condoned by a union. *See, e.g., Griggs* v. *Duke Power Co., supra*, and the cases cited at page 19, *supra*. In fact, the Board admits as much. NLRB Br. 23-24. And it is no answer to claim, as does the Board, NLRB Br. 31 n. 12, that all such problems are obviated by the union's duty of fair representation:

> "[A] breach of the union's duty of fair representation may prove difficult to establish. . . . In this respect, it is noteworthy that [despite the existence of the duty of fair representation] Congress thought it necessary to afford the protections of Title VII against unions as well as employers." *Alexander* v. *Gardner-Denver Co., supra*, 94 S. Ct., at 1024-25, n. 19.

[17] In fact, a strong argument can be made from the fact that the minority employees need greater protection when the union disagrees with their views than when it agrees. See Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L.J. 47, 67 (1969).

sort of "divisiveness" depended upon the filing of a complaint in court. Thus, Congress has simply not authorized the union "to maintain a united front" where the minority workers believe that their rights to fair racial treatment are not adequately protected.

A slight variant of the Board's argument here is its claim that even where minority employees and the union agree both as to the existence of discrimination and as to the necessary remedies, the possibilities for conflict of tactics and timing "are legion" and such conflicts will undermine the union's position. NLRB Br. 22. As the preceding discussion made clear, this contention too is simply irrelevant. Where disputes over tactics arise, minority employees have a statutory right to pursue their Title VII remedies whatever the effect on the union.

But even assuming the relevance of the argument, it is factually unsupported here. There were no pending overall contract negotiations between the local union and the Emporium which the handing out of the leaflets embarrassed. Moreover, as a factual matter, in terms of the specific issue as to the elimination of discrimination, there was no dispute in tactics and the actions of Hawkins and Hollins did not undermine the position of the local union. Indeed, the local so states in its *amicus* Brief herein in support of respondent.

Second, as a legal matter, the Board has consistently taken the position—though as the citations below demonstrate, the courts have not always agreed—that a wildcat strike by dissident employees is a protected activity so long as the strike does not breach the collective bargaining agreement and is generally supportive of the union's position. *See NLRB* v. *R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *San Juan Lumber Co.*, 154 N.L.R.B. 1153 (1965), *aff'd per curiam*, 367 F.2d 397 (9th Cir. 1966); *Lee A. Con-*

saul Co., 175 N.L.R.B. 547 (1969), *rev'd per curiam*, 469 F.2d 84 (9th Cir. 1972). The leafleting here was not in breach of any provision of the collective bargaining agreement, was a less drastic measure than a wildcat strike, and was generally supportive of the local union's position.

We are at a loss to understand the rationale by which a wildcat strike—which is plainly not specifically authorized by any statute—would be protected when supportive of the union's position, but a similarly supportive exercise of Title VII rights by minority employees would not be.[18] It would be a strange ordering of prorities among "concerted activities" under Section 7 of the NLRA to prefer wildcat strikes to leafleting against discrimination, even if the objective of the latter was not additionally supported by the Civil Rights Act.

3. *"Scylla and Charybdis."* The petitioners and a number of the *amici* who support them claim that the decision of the court below unfairly traps the employer between equally untenable alternatives. Thus, the Board goes so far as to contend that

> "the employer would be placed in the position of running a serious risk of committing an unfair labor practice no matter what he did to resolve the situation: taking reprisals against the dissident employees would violate Section 8(a)(1) if their activities were subsequently held to be protected; but bargaining with the dissidents would violate Section 8(a)(5) if their activities were unprotected." NLRB Br. 21-22.

The Emporium makes the same argument somewhat more vividly: it claims that the employer is now required to bargain with minority employees and raises the spectre of groups of black, yellow, red, and brown employees, and

[18] The AFL-CIO's order of priorities appears to favor such a result. AFL-CIO Br. 13-14.

even women, each with conflicting demands, besieging their employer. Emporium Br. 7-9.[19]

These arguments not only misinterpret the decision of the Court of Appeals, but misunderstand the entire relation between minority rights and the bargaining process. First, no decision has held, and no party to this proceeding contends, that any employer is required to bargain with any minority employee. This is a discharge case, not a refusal to bargain case; the charges were preferred against the Emporium for firing the two men, not for refusing to bargain with them. All that is required of the employer is that he not fire a minority employee who seeks to bargain as to issues of racial discrimination. Hence, if the employer believes that he will be faced with conflicting demands, or for any other reason does not wish to discuss his racially discriminatory policies with his minority employees, he need not do so. He may simply sit back and wait for them to file a Title VII suit. If he does not want to discuss the matter even then, he can wait for the courts to resolve it.

Second, the Board's contention that the employer could be guilty of a Section 8(a)(5) unfair labor practice if he bargained with minority employees simply misunderstands the statutory framework and begs the question: an employer can hardly commit an unfair labor practice by settling a Title VII claim. As noted above, minority employees are entitled to settle their Title VII claims short of litigation. Similarly, an employer is entitled to defend against or settle his employees' Title VII claims. Indeed,

[19] This same practical problem—to the extent that it is a problem—of mutually inconsistent minority demands would, of course, confront an employer even if his plant or shop were unorganized and, accordingly, he could not even attempt to cite Section 9(a) of the NLRA against the various minorities.

Title VII strongly encourages such settlements. Hence, an employer's meeting with minority employees in an attempt to settle disputes over Title VII rights cannot be an unfair labor practice.

Third, in any instance in which the rights of individual employees are involved, the employer faces some risk of different groups of employees seeking different results. Thus, for example, in *United States* v. *Local 189*, 282 F. Supp. 39 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), black employees, in that case represented by the government, and white employees, represented by the union, made conflicting demands upon the employer. Similarly, in the *Air Line Stewards* case, *supra*, one group of employees represented by the union and another representing themselves made different demands. In both instances, the dispute ultimately had to be resolved by litigation. Indeed, that is what the courts are for—to resolve disputes that cannot be negotiated. But the fact that in occasional instances conflicting viewpoints between majority and minority employees, or even as between different minority employees, may necessitate litigation to resolve a dispute hardly means that minority employees should be forbidden to attempt to resolve disputes short of litigation.

Fourth, in any case, the facts here are that Hawkins and Hollins asked to meet with the president of the Emporium to discuss problems of racial discrimination, but the president would not talk to them. The union supported the minority workers and there were no conflicting demands by others. In fact, no specific demands were made at all since the Emporium refused to discuss the matter. Thus, as a matter of fact, the Emporium was in no sense "trapped" by conflicting minority viewpoints.

4. "*Economic Coercion.*" It is next claimed that if an employer is picketed or leafleted it must, as a practical matter, either endure "economic coercion" or bargain with the minority group. Emporium Br. 6. The Emporium's contention in this regard may well be true, but is entirely irrelevant. There are many situations under the labor laws in which an employer may be legally justified in refusing to take a particular action, but is nonetheless legally subject to economic pressure. For example, in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938), an employer who hired only whites at a particular grocery store was picketed by an organization composed of black neighborhood residents. This Court held that the picketing was protected by the anti-injunction provision of the Norris-LaGuardia Act even though the picketing persons were obviously not employed by the grocery company and the company had no duty to bargain with them. Also significant in this regard is *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960). In that case, union members conducted harassing activities—including picketing and distributing leaflets outside the offices of the company involved—in order to put economic pressure on the employer during the bargaining. That activity was held to be perfectly consistent with the goals of the NLRA:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the [labor law] system . . . ." 361 U.S., at 489.

5. "*Violation of Section 8(b)(7)(A).*" The Board and the Chamber of Commerce contend, apparently seriously, that Hawkins' and Hollins' activities violated Section 8(b)(7)(A) of the NLRA. NLRB Br. 37-39; Chamber of Commerce Br. 4-5 n. 4. That section of the NLRA makes it an unfair labor practice for a

> "labor organization . . . to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with [it] as the representative of his employees . . . where the employer has lawfully recognized . . . [another] labor organization." 29 U.S.C. § 158(b)(7)(A).

There are a number of difficulties with this argument. First, as a procedural matter, the Board is suggesting that its decision be affirmed on a rationale it did not follow at the administrative level. Such a suggestion is plainly unacceptable under well-established principles of administrative law. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *American Trucking Ass'ns* v. *United States*, 364 U.S. 1, 14 (1960).

Second, Section 8(b)(7)(A) applies only to labor organizations. To interpret the NLRA to turn Hollins and Hawkins, standing on the street corner in San Francisco passing out leaflets, into a labor organization requires a linguistic tour-de-force well beyond that usually countenanced, at least in our legal system:

> "In actual practice, the section [dealing with actions undertaken by an organization] was so broadened that no organization whatever was required. I myself experienced the subtle application of this section. *Two* of us had secretly exchanged thoughts—*in other words* we were the beginnings of an organization, *in other words* an organization!" A. Solzhenitsyn, *The Gulag Archipelago* 66-67 (Fontana ed. 1974) (emphasis original).

Third, Section 8(b)(7)(A) was designed to safeguard employers against situations in which rival unions seek to represent or negotiate on behalf of employees. It is obvious that Hawkins and Hollins were not seeking to represent the Emporium's employees in any traditional

sense. Thus, Hawkins and Hollins were not interested in executing a separate collective bargaining agreement or attacking the existing agreement on wages, hours, and the like. Neither were they attempting to establish a continuing negotiating relationship with their employer. Rather, Hawkins' and Hollins' actions in seeking to negotiate were narrowly limited to issues of racial discrimination current at the time. As the earlier discussion demonstrated, Title VII provides minority employees with the right to discuss such issues with their employer without consultation with the union and without regard to the terms of the collective bargaining agreement. *Alexander* v. *Gardner-Denver Co., supra.* Section 8(b)(7)(A) cannot properly be intepreted to prohibit activity specifically authorized by Title VII.

6. *"Unlawful Activity."* Finally, the Chamber of Commerce and the Board make a catch-all and general assertion that Hawkins' and Hollins' "picketing" was "unlawful" and, hence, cannot be protected activity. Chamber of Commerce Br. 4; NLRB Br. 40. But it is plain that, whatever the resolution of this case may be, the handing out of leaflets protesting racial discrimination by an employer is hardly "unlawful." Leafleting for work-related purposes is a lawful, protected activity which a union may not waive or impede through the collective bargaining agreement. *NLRB* v. *Magnavox Co., supra.* Indeed, leafleting to protest racial discrimination in employment was specifically upheld as a labor activity in *New Negro Alliance* v. *Sanitary Grocery Co., supra.* In fact, it seems clear that the activity in which Hawkins and Hollins engaged on the public sidewalks of the City of San Francisco was protected by the First Amendment to the United States Constitution. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). As such, it cannot be said to be "unlawful."

Even if the "objective" of the leafleting could make it "unlawful," which seems to be a dubious proposition, it can hardly be said that the objective of the leafleting here —whether viewed as ending racial discrimination or, as the Examiner found, to treat with the employer as to the problem of racial discrimination—is an unlawful one. It is symptomatic of the grudging view of Title VII of the Civil Rights Act espoused by the Board throughout that the Board equates the activity here with criminal conduct of the sort referred to by this Court in *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S., at 803, as being the kind of "deliberate, unlawful activity" which Title VII of the Civil Rights Act does not protect. NLRB Br. 40. This, of course, is simply not such a case.

CONCLUSION

In the present case, Hawkins and Hollins were fired for engaging in concerted activities which had as their purpose the vindication of individual statutory rights vested in them by Title VII of the Civil Rights Act. Those rights are personal and may be pursued notwithstanding the existence of other remedies under the collective bargaining agreement and notwithstanding the exclusivity principle set forth in the NLRA. Since Hawkins' and Hollins' actions were classic protected concerted activities, and since for the reasons stated their objective did not take these activities out of the protection of Section 7 of the NLRA, Hawkins' and Hollins' discharge was an unfair labor practice under Section 8(a)(1) of the NLRA.

For these reasons, insofar as the Court of Appeals set aside the Board's order, its judgment was correct. However, since Title VII rights are independent of the collec-

tive bargaining agreement or the action of the union in enforcing that agreement's provisions against racial discrimination, the legality of the objectives of the individuals, and their protection under Section 7 of the NLRA, does not, as the majority of the Court of Appeals held, depend on whether the union was attempting to process Hawkins' and Hollins' grievances "to the fullest extent possible by the most efficacious means." Accordingly, this Court should now order that Hawkins and Hollins be reinstated.[20]

Respectfully submitted,

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[20] The majority of the Court of Appeals included in its remand order a requirement that the Board determine whether Hawkins' and Hollins' leaflet was "disloyal" within the meaning of *NLRB* v. *Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) (disparagement of employer's product or services). The Trial Examiner considered this issue and concluded that the Board has not in the past reached a finding of disloyalty based upon language and actions of the sort at issue here. (P.A. 101) There is no reason to require a reconsideration of that issue at this point.